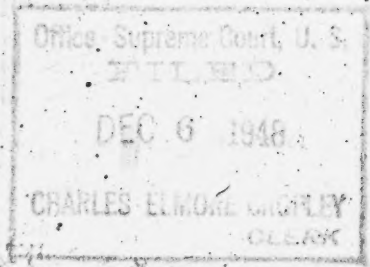


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 448

**NATIONAL DISTILLERS PRODUCTS CORPORA-
TION, New York, New York,**

Appellant,

vs.

C. EMORY GLANDER, Tax Commissioner of Ohio

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT AS TO JURISDICTION

ISADORE TOPPER,
Counsel for Appellant..

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SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION,
NEW YORK, NEW YORK,

vs.

Appellant,

C. EMORY GLANDER, TAX COMMISSIONER, STATE OF OHIO,

Appellee

STATEMENT IN SUPPORT OF JURISDICTION

The appellant, National Distillers Products Corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A

Statutory Provisions Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 1257 of Title 28 of the United States Code, which reads as follows:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

B

Statutes of Ohio, the Validity of Which Is Involved

The statutes of the State of Ohio, the validity of which has been sustained by final judgment of the Supreme Court of Ohio, the highest Court of the State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio. The pertinent provisions thereof are:

Section 5325-1 of the General Code of Ohio, which reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-

resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1 of the General Code of Ohio, which reads in part as follows:

"* * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code * * * shall be subject to taxation * * *."

Section 5328-2 of the General Code of Ohio, which reads in part as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. * * *"

The foregoing provisions, particularly Section 5328-2 of the General Code of Ohio, as interpreted and applied in this

case by the Tax Commissioner of Ohio, the Board of Tax Appeals of Ohio, and the Supreme Court of Ohio, are in conflict with Section 8 of Article I of the Constitution of the United States and with the Fourteenth Amendment to the Constitution of the United States.

C

Date of Judgment and Date of Application for Appeal

The date of final judgment of the Supreme Court of Ohio, which is now sought to be reviewed was October 6, 1948. The opinion and decision of the Supreme Court of Ohio was rendered on August 4, 1948, and the mandate thereupon was stayed by seasonable application for rehearing filed with the Supreme Court of Ohio by appellant on August 16, 1948, which application for rehearing was overruled by said Supreme Court of Ohio on October 6, 1948. The judgment of the Supreme Court of Ohio in the above entitled cause became effective on said date, October 6, 1948. The date for taking the appeal began to run on the date of the denial of said application for rehearing, to-wit, October 6, 1948. *Department of Banking v. Pink*, 317 U. S. 264, 266; 87 L. Ed. 254, 256; *Gypsy Oil Co. v. Escoe*, 275 U. S. 498, 72 L. Ed. 393.

The date on which the application for appeal was presented and the appeal allowed was October 30, 1948.

Under the provisions of Sections 2101 and 2104 of Title 28 of the United States Code, the appellant may bring its appeal within ninety days after the entry of the final judgment rendered by the Supreme Court of the State of Ohio.

D

Nature of Case and Rulings Below

The appellant is a corporation organized under the laws of the State of Virginia, with its principal office and place

of business in the City of New York, in which State it is qualified to do business as a foreign corporation. It is also qualified to do business as a foreign corporation in the State of Ohio wherein it maintains and operates a distillery at Carthage, Hamilton County, Ohio. The appellant is principally engaged in the business of manufacturing alcohol, whiskey and alcoholic beverages in the States of Ohio, Kentucky, Pennsylvania, Maryland, Illinois, New Jersey and Missouri. It sells its various products in the states where the sale and distribution of alcoholic beverages is not a state monopoly through its regional sales offices located in such states, all orders taken by such regional sales offices being subject to approval and acceptance at the office of the appellant located in New York City. Sales to monopoly states, such as Ohio, are made by and through the office of appellant in New York City.

The appellant filed an annual Ohio personal property tax return for the year 1944, at the time and in the manner prescribed by law, and paid a tax in an amount computed on the basis of said return. Thereafter, on December 5, 1945, the Tax Commissioner of Ohio by preliminary assessment certificate (R. 1) ascribed an Ohio situs to a part of the accounts receivable of the appellant totaling the sum of \$2,996,670.00 and added that amount to the personal property tax return of the appellant. The accounts receivable so added to the return of appellant by the Tax Commissioner of Ohio involved accounts receivable arising from sales negotiated, approved and made outside the State of Ohio by appellant during the year 1943 from products manufactured in and shipped from its plants in Ohio, on instructions from its offices in New York City. The accounts receivable were controlled by and payable to the appellant in New York City, and the proceeds thereof deposited in banks in New York City and used, together with

other funds, by the appellant in the operation of its business throughout the United States. The Tax Commissioner, after ascribing an Ohio situs to said accounts receivable, made and issued an additional assessment certificate against appellant for the tax year 1944 in the sum of \$8,990.01.

After the additional assessment certificate was issued, appellant filed with the Tax Commissioner of Ohio an application for review and correction of the 1944 additional intangible personal property tax assessment made by the Tax Commissioner (R. 2) in which the appellant recited and declared that the determination and assessment made by the Tax Commissioner that such accounts receivable of appellant were allocable to Ohio for the purpose of taxation was contrary to and constituted a violation of Section 8 of Article I of and of the Fourteenth Amendment to the Constitution of the United States (R. 2, 3).

On January 8, 1946, the Tax Commissioner of Ohio denied said application for review and redetermination in an entry in which said Tax Commissioner held that he was without authority to set aside acts of the Legislature of Ohio on constitutional grounds, referring specifically to the contention of appellant made in its application for redetermination and review (R. 4). From this order of the Tax Commissioner of Ohio a notice of appeal was filed by appellant with the Board of Tax Appeals of the State of Ohio on January 16, 1946, in the manner required by law, and in a petition on appeal filed by appellant on said date contended that "the finding, determination, assessment and order of the appellee that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation is contrary to and constitutes a violation of Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States, * * *" (R. 8).

The case was heard and submitted to the Board of Tax Appeals upon the transcript of the proceedings before the

Tax Commissioner, a stipulation of facts and on the briefs and oral argument of counsel, and on March 12, 1947, the Board of Tax Appeals denied the appeal of appellant and in its affirmance of the action of the Tax Commissioner declined to consider or pass upon the constitutional questions raised by appellant in its appeal. The opinion and entry of the Board of Tax Appeals is set forth in full in Appendix B hereto appended.*

Appellant filed an appeal on April 2, 1947, from said decision of the Board of Tax Appeals to the Supreme Court of Ohio and in its assignment of errors filed with said Court contended and asserted in its fifth assignment of error "that the finding, determination, assessment and order of the appellee, approved and confirmed by the Board of Tax Appeals, that the aforesaid accounts receivable of the appellant were allocable to Ohio for the purpose of taxation and taxable in Ohio is contrary to and violates Section 8 of Article I of and the Fourteenth Amendment to the Constitution of the United States, * * *." The case was submitted to the Supreme Court of Ohio on the record, the stipulation of facts, and the briefs and arguments of counsel.

On August 4, 1948, the Supreme Court of Ohio rendered an opinion in which it held that on the facts stated in the stipulation of facts filed in this case, the appellant, as a corporation organized and existing under the laws of the State of Virginia is a legal resident of that State; and as to the appellant, the State of Ohio is "a state other than that in which the owner thereof resides," within the provisions of Sections 5328-2 of the General Code fixing the situs of accounts receivable and of other intangible personal prop-

* (Clerk's Note.—The opinion and entry are printed as an appendix to the Statement as to Jurisdiction in the case of *Wheeling Steel Corp. v. Glander*, No. 447, October Term, 1948 and is not reprinted here).

erty for the purpose of taxation: The Court further held that in this situation and applying the statutory provisions in question, viz: Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as the same have been construed by the Supreme Court of Ohio, it follows that since the accounts receivable of appellant arose in the conduct of its business in the State of Ohio by the sale of its products from a stock of goods located in the State of Ohio, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by appellant in its business, whether in the State of Ohio or elsewhere, such accounts receivable have a business and taxable situs in the State of Ohio, as found and determined by the Tax Commissioner of Ohio. The Supreme Court of Ohio further held that said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio are not in conflict with the provisions of Section 8 of Article I of the Constitution of the United States and with the provisions of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Ohio affirmed the decision of the Board of Tax Appeals of the State of Ohio, which sustained the action of the Tax Commissioner of Ohio in assessing the accounts receivable as personal property for tax purposes. See Appendix A hereto appended, Opinion, Supreme Court of Ohio, 150 O. S., 229.*

E

Substantiality of Questions Involved

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established

* (Clerk's Note.—The opinion is printed as an appendix to the Statement as to Jurisdiction in the case of *Wheeling Steel Corp. v. Glander*, No. 447, October Term, 1948 and is not reprinted here).

that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton v. Regents of University of California*, 293 U. S. 245, 258, 79 L. Ed. 343, 350. In this regard it is pointed out that the Board of Tax Appeals of the State of Ohio in its opinion (set forth in full as Appendix B appended hereto) said:

"With respect to a question such as that here presented, to-wit, that as to the taxation of the accounts receivable of a foreign corporation arising in the conduct of its business in this state, the application of the above quoted provisions of Sections 5328-1, 5328-2 and other related Sections of the General Code, as the same have been construed by the Supreme Court, presents, to our mind, a serious question as to the constitutionality of said statutory provisions as so construed under the due process of law clause of the federal Constitution. * * *

"Whatever the answer may be as to the constitutionality of the above quoted provisions of Sections 5328-1, 5328-2 and related sections of the General Code, as the same have been heretofore construed by the Supreme Court of this State, in their application to the facts of this case, it is quite clear that the Board of Tax Appeals as an administrative and quasi judicial board or tribunal has no jurisdiction and authority to consider and determine such constitutional question."

The issue raised by the contention of appellant that the application of the Ohio statutes herein involved, by the Tax Commissioner of Ohio under the decision in this case of the Supreme Court of Ohio constitutes such statutes a burden upon interstate commerce in violation of Section 8 of Article I of the Constitution of the United States presents the question of whether accounts receivable, being the intangible personal property of a corporation domiciled in Virginia and maintaining a commercial domicile in New York may

be subjected to a multiple state tax burden where such intangible personal property is an integral and inseparable part of the interstate commerce in which the owner thereof is engaged. See *Memphis Natural Gas Co. v. Stone*, 92 L. Ed., 1409, 1415; *Central Greyhound Lines v. Mealey*, 92 L. Ed., 1235, 1240; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U. S., 422, 428, 91 L. Ed. 993, 1001; *Freeman v. Hewit*, 329 U. S. 249, 256, 91 L. Ed. 265, 274; *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, 311, 82 L. Ed. 1365, 1369; *Western Livestock Association v. Bureau of Revenue*, 303 U. S., 250, 255, 82 L. Ed., 823, 828.

A decision by the Supreme Court of the United States on the questions herein involved will remove grave uncertainty in the field of interstate commerce involving sales of goods manufactured in one state and sold in another and transactions frequently involving the intervention of important and essential activities in yet a different state. Any business entity having diversified manufacturing and sales activities is vitally interested in the results of this litigation because of the danger inherent in the decision of the Supreme Court of Ohio that a cumulative multiple burden will be imposed by state taxation upon interstate commerce, not only causing a serious impediment to such commerce but further discriminating against businesses engaged in interstate commerce in a manner tending to favor businesses engaged solely in intrastate commerce.

The issue raised by the contention of appellant that the statutes of the State of Ohio herein questioned violate the due process clause of the Fourteenth Amendment to the Constitution of the United States involves the problem of taxation of intangible personal property, no incident of the ownership of which lies within the territorial jurisdiction of the taxing state. Thus is drawn into question whether a state, by legislative definition of "business situs" of intan-

gible personal property, may bring within its taxing jurisdiction intangible personal property, which, under all commonly and judicially understood concepts of "business situs" has a business situs outside the taxing jurisdiction of the state.

The Supreme Court of Ohio in its decision in this case held that on the facts set forth in the stipulation of facts filed in this case, the appellant was the owner of accounts receivable which arose out of sales made from a stock of goods maintained within the State of Ohio, and that said accounts receivable or the avails thereof were used in business by said appellant whether in Ohio or elsewhere. The Supreme Court of Ohio further held that the taxation of such accounts receivable by the State of Ohio did not involve a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Appellant, however, contends that in order for accounts receivable or other intangible personal property to be taxed by a state other than the state in which the owner is a resident, without a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, such accounts receivable or other intangible personal property must have acquired a business situs in the state so assessing the tax. Appellant further contends that a business situs is a real and substantial legal concept and cannot validly be created by legislative fiat, and appellant contends and submits that the factual basis upon which the Supreme Court of Ohio found business situs to exist in this case with respect to the accounts receivable taxed by the State of Ohio is insufficient to support such a finding and, therefore, the application of the statutes in question in the manner set forth in the decision of the Supreme Court of Ohio in this case constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United

States. See *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77, 80, 82 L. Ed., 674, 677; *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, 211, 80 L. Ed., 1143, 1148; *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 548, 78 L. Ed., 1411, 1419; *Air Way Electrical Appliance Corp. v. Day*, 266 U. S. 71, 83, 69 L. Ed., 169, 177; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 141, 62 L. Ed., 624, 629.

The issue raised by the above set forth contention of appellant that the application of the statutes herein questioned constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States has never been passed upon by the Supreme Court of the United States, the Court never having been presented with a factual legal situation such as that in the instant case in which business situs of intangibles is defined by the legislature of a state to be something other than the well defined judicial concept of business situs which can and does give rise to taxability of intangible personal property.

The issue raised by the contention of appellant that the application of the statutes of the State of Ohio herein questioned in accordance with the decision of the Supreme Court of Ohio constitutes such statutes a violation of the equal protection clause of the Constitution of the United States involves the question of whether a foreign corporation may be taxed upon its intangible personal property in factual circumstances under which a domestic corporation would escape the taxation on precisely the same type of intangible personal property.

The decision of the Supreme Court of Ohio relative to the taxation of the accounts receivable of appellant in question in the instant case clearly approves the taxation of intangible personal property of appellant, a foreign corporation, whereas, if appellant were a domestic corporation,

the same intangible personal property would be exempt from taxation under the law of Ohio, as announced by the Supreme Court of Ohio in the case of *Ransom and Randolph v. Evatt*, 142 U. S. 398. Such a result clearly involves discrimination against a foreign corporation and constitutes a denial to such foreign corporation to the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. See *Concordia Fire Insurance Co. v. Illinois*, 292 U. S. 535, 548, 78 L. Ed., 1411, 1419.

WHEREFORE, the appellant, National Distillers Products Corporation, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 1257 of Title 28 of the United States Code.

Respectfully submitted,

ISADORE TOPPER, .

*Attorney for National Distillers
Products Corporation, Appellant.*

APPENDIX "A"

IN THE SUPREME COURT OF OHIO

No. 31037

NATIONAL DISTILLERS PRODUCTS CORPORATION, New York,
New York, *Appellant*,

vs.

C. EMORY GLANDER, Tax Commissioner, State of Ohio,
Appellee.

Certificate as to Federal Question Involved

It is certified that the above entitled cause came on for hearing in the Supreme Court of Ohio upon the record of proceedings, the stipulation of facts, and the briefs and arguments of counsel, and that at each stage of the proceedings in this case substantial federal questions were raised by and argued and urged by appellant, to-wit: (1) That Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as said sections have been applied by the Tax Commissioner of Ohio in this case, are contrary to and in violation of Section 8 of Article I of the Constitution of the United State; (2) That said Sections 5325-1, 5328-1 and 5328-2 of the General Code of Ohio as applied in this case by the Tax Commissioner of Ohio, are contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Such questions were raised by appellant in its application for review and redetermination of the assessment of the Tax Commissioner (R. 2, 3), in its petition on appeal filed with the Board of Tax Appeals of Ohio on January 16, 1946 (R. 8) and in its assignments of error and brief filed with the Supreme Court of Ohio.

With respect to such substantial federal questions, the Tax Commissioner of Ohio found and determined that he did not have authority to set aside acts of the legislature on constitutional grounds and the Board of Tax Appeals found that it was without authority to consider and deter-

mine questions of constitutionality of statutes of the State of Ohio. Further, with respect to substantial federal constitutional questions, the Supreme Court of Ohio held that said Sections 5325-1, 5328-1 and 5328-2 as applied by the Tax Commissioner of the State of Ohio in this case were not contrary to nor in violation of Section 8 of Article I of the Constitution of the United States nor contrary to nor in violation of the Fourteenth Amendment to the Constitution of the United States.

Witness the Honorable Supreme Court of Ohio this 30 day of October, 1948.

SUPREME COURT OF OHIO,
By CARL V. WEYGANDT,
*Chief Justice of the Supreme
Court of Ohio.*

(9903)